

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE  
COUNCIL, et al.,

No. C 01-0421 JL

Plaintiffs,

**LEAVE TO AMEND COMPLAINT**

v.

DONALD EVANS, et al.,

Defendants.

**Introduction**

Plaintiffs' Expedited Motion for Leave to Amend their Complaint came on for hearing March 24, 2004. Attorney for Plaintiffs was Drew Caputo, Natural Resources Defense Council, San Francisco, California. Attorney for Defendants was Mauricia M.M. Baca, Department of Justice, Washington, D.C.

**Summary**

**Questions presented:**

1. Must a party file a new lawsuit to obtain judicial review of a regulation proposed by an agency in response to the Court's remand under the provisions of the Magnuson-Stevens Act and the Administrative Procedures Act?

2. May a party amend its complaint in the action in which the court remanded the previous regulation to obtain judicial review of the proposed replacement regulation for the court to decide whether the proposed regulation complies with the court's order?

This Court concludes that under these circumstances a party need not file a new lawsuit to obtain judicial review, but may amend its complaint.

### Procedural Background

The original complaint in this action challenged Amendment 12 to the Pacific groundfish fishery management plan ("FMP"), issued by National Marine Fisheries Service ("NMFS") to govern preparation of rebuilding plans for overfished Pacific groundfish species.

This Court *inter alia* granted summary judgment to Plaintiffs in August 2001, and ruled in full as follows:

"Judicial review of agency decision-making is appropriately circumscribed by statutes such as the APA, the MSA, and NEPA.<sup>1</sup> The role of the judiciary in this regard is not to substitute its own policy considerations for those of an agency. Rather, the role of the courts is to ensure that agencies governed by the executive follow the express statutory mandates enacted by the legislature. In this regard, the NMFS has failed to adhere to the aforementioned provisions of the APA, the MSA, and NEPA, and, accordingly,

The court hereby grants the following relief:

- 1. Declaratory judgment that NMFS's revised 2001 specifications for bocaccio rockfish and lingcod fishing limits violates the M.S.A. and APA by failing to adequately account for discard mortality;
- 1a. An order that NMFS reassess its 2001 specifications using a legally adequate consideration of discard mortality;
- 2. Declaratory judgment that NMFS violated the M.S.A. and the APA by not

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<sup>1</sup> Administrative Procedures Act, Magnuson-Stevens Act, National Environmental Policy Act.

1 providing prior public notice and allowing for comment on the 2001  
2 specifications after their publication by the Secretary;

- 3 • 2a. An order that, in accordance with the M.S.A. and the APA, NMFS  
4 provide prior public notice and allow comment on future Pacific  
5 groundfish specifications;
- 6 • 3. Declaratory judgment that Amendment 12 violates the M.S.A. by  
7 authorizing inadequate rebuilding plans for overfished species;
- 8 • 3a. An order setting aside that portion of Amendment 12 that authorizes  
9 rebuilding plans that do not accord with the M.S.A. and remanding it to  
10 NMFS for further consideration;
- 11 • 4. Declaratory judgment that the Environmental Assessments NMFS  
12 performed in conjunction with Amendment 12 and the 2001 bocaccio  
13 and lingcod groundfish specifications failed to consider a reasonable  
14 range of alternatives and environmental consequences, in violation of  
15 NEPA;
- 16 • 4a. An order setting aside and remanding the EAs performed in  
17 conjunction with Amendment 12 and the 2001 groundfish specifications  
18 to NMFS.

19 The court hereby grants to NMFS the following:

- 20 • 3. Declaratory judgment that the issue of Amendment 12's inclusion of a  
21 "mixed-stock exception" is not yet ripe for adjudication;
- 22 • 3a. An order allowing the "mixed-stock exception" of Amendment 12 to  
23 stand, subject to any revisions NMFS implements after conducting an  
24 adequate EA in conjunction with 4a supra;
- 25 Plaintiffs' Motion to Strike Defendants' Answer is denied, as moot.

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28 *Natural Resources Defense Council, Inc. v. Evans*, 168 F.Supp.2d 1149, 1160 -1161

1 (N.D.Cal.,2001)

2 Defendants appealed only the portion of this Court's order dealing with the notice and  
3 comment provisions of the Administrative Procedures Act ("APA").

4 The Court of Appeals, Rymer, J., affirmed this Court's ruling that NMFS failed to  
5 comply with the APA's notice and comment requirements, but vacated that portion of this  
6 Court's ruling requiring all future specifications and management measures to undergo notice  
7 and comment under the APA.

8 The Court of Appeals declined to reach the issue of whether NMFS also violated the  
9 notice and comment provisions of the Magnuson-Stevens Act.

10 *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904, 913 (9th Cir. 2003).

11 Plaintiffs meanwhile had moved this Court for an order establishing a timetable for  
12 Defendants' compliance with the order to prepare rebuilding plans. In its order issued January  
13 17, 2003, the Court ruled *inter alia* that it retained jurisdiction over the consolidated cases of  
14 C-01-0637 and C-01-0421 to enforce its orders on remand, but denied Plaintiffs' request for a  
15 timetable because they had offered insufficient specific recommendations. Defendants did not  
16 appeal this order.

17 The parties continued to negotiate the timetable for the rebuilding plans and Plaintiffs  
18 filed a new motion which the Court substantially granted on October 27, 2003, setting specific  
19 timetables for NMFS' compliance with the Magnuson-Stevens Act's timetable for taking action  
20 on rebuilding plans. Defendants did not appeal this order.

21 The case is still open, and no final judgment has been entered. Defendants continue to  
22 submit progress reports every six months.

23 Defendants themselves acknowledge that Amendment 16 was drafted in response to  
24 this Court's August 2001 ruling in this case. See Letter from D. Robert Lohn, Regional  
25 Administrator, NMFS to Donald Hansen, Chair, Pacific Fishery Management Council  
26 (November 14, 2003) (Exhibit A to Plaintiffs' Motion for Leave to Amend Complaint)  
27 ("Amendment 16-1 is also intended to partially respond to a Court order in *Natural Resources*  
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1 *Defense Council, Inc. V. Evans*, 168 F.Supp.2d 1149 (N.D.Cal. 2001), in which the court  
2 determined that Pacific Coast groundfish rebuilding plans must be in the form of FMP's, FMP  
3 amendments or regulations.") 69 Fed.Reg. at 8,862 (same).

#### 4 **Petition for Review Under MSA**

5 The Magnuson-Stevens Act provides the following mechanism for review of a new  
6 regulation:

7 (f) Judicial review

8 (1) Regulations promulgated by the Secretary under this chapter and actions described  
9 in paragraph (2) shall be subject to judicial review to the extent authorized by, and in  
10 accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after  
11 the date on which the regulations are promulgated or the action is published in the Federal  
12 Register, as applicable; except that--

13 (A) section 705 of such Title is not applicable, and

14 (B) the appropriate court shall only set aside any such regulation or action on a ground  
15 specified in section 706(2)(A), (B), (C), or (D) of such Title.

16 (2) The actions referred to in paragraph (1) are actions that are taken by the Secretary  
17 under regulations which implement a fishery management plan, including but not limited to  
18 actions that establish the date of closure of a fishery to commercial or recreational fishing.

19 (3)(A) Notwithstanding any other provision of law, the Secretary shall file a response to  
20 any petition filed in accordance with paragraph (1), not later than 45 days after the date the  
21 Secretary is served with that petition, except that the appropriate court may extend the period  
22 for filing such a response upon a showing by the Secretary of good cause for that extension.

23 (B) A response of the Secretary under this paragraph shall include a copy of the  
24 administrative record for the regulations that are the subject of the petition.

25 (4) Upon a motion by the person who files a petition under this subsection, the  
26 appropriate court shall assign the matter for hearing at the earliest possible date and shall  
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1 expedite the matter in every possible way.

2 16 U.S.C.A. § 1855.

3 Plaintiffs contend that they may file their request for judicial review as a motion for leave  
4 to supplement their complaint in this action, since Amendment 16 is Defendants' revision of  
5 Amendment 12 in compliance with this Court's orders.

6 Defendants object that Amendment 16 is a new regulation that requires that Plaintiffs  
7 file a new lawsuit to obtain judicial review.

8 **Plaintiffs have substantive objections to Amendment 16-1**

9 Plaintiffs' review of the proposed Amendment 16-1 reveals that "it shares many of the  
10 same deficiencies as Amendment 12. Perhaps most significantly, Amendment 16-1 purports  
11 to authorize NMFS to issue rebuilding plans that fail to address the reasons why an overfished  
12 species became overfished in the first place. For example if a species has become  
13 overfished in significant part due to bycatch, Amendment 16-1 allows NMFS to issue a  
14 rebuilding plan that includes no requirements to reduce bycatch and bycatch mortality. NRDC  
15 believes Amendment 16 violates the Magnuson-Stevens Act in this regard, just as [they]  
16 believed (and pled in the original complaint) that Amendment 12 violated the Magnuson-  
17 Stevens Act for the same reasons. See Complaint paragraphs 35-41."

18 In its proposed Amended Complaint, Plaintiffs seek to raise the same challenges to  
19 Amendment 16-1 that they raised against Amendment 12. Plaintiffs pursue the same legal  
20 claims against a new agency action, the action explicitly intended by the agency to replace the  
21 previous agency action that was invalidated by this Court.

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24 Defendants object that Amendment 16 is a new regulation based on a different  
25 administrative record and that the case for which Plaintiffs seek to amend their complaint has  
26 been adjudicated by this Court's grant of summary judgment to Plaintiffs.

27 **Analysis**

**This Court has inherent power to enforce orders after remand**

The district court has inherent power to enforce its orders. *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) (“Without jurisdiction to enforce a judgment entered by a federal court, the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.”)

This includes power to enforce an order following remand. *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 456 (9<sup>th</sup> Cir. 1990) (“in general, remand orders are not considered final”)

**The *Planned Parenthood* case on which Defendants rely is inapposite**

Defendants contend that the Court of Appeals denied a motion to file a supplemental complaint in “a strikingly analogous situation.” *Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d 400 (9<sup>th</sup> Cir. 1997).

In that case, after prevailing in a class action to enjoin enforcement of the Arizona parental consent abortion statute, Planned Parenthood and other plaintiffs moved for leave to supplement their original complaint so as to challenge the constitutionality of a revised statute. After the motion was granted and class certification of the original action was preserved, the district court found the revised statute unconstitutional and enjoined its enforcement. Defendants appealed. The Court of Appeals held that allowing plaintiffs to supplement their original complaint so as to challenge the revised statute was abuse of discretion.

This Court finds the *Planned Parenthood* situation to be clearly distinguishable.

The *Planned Parenthood* case involved a different *statute* from the one at issue in the original case, which had presumably been revised by legislative action, not administrative process. The case at bar involves an amendment to a regulation, the successor amendment to the one which the Court remanded.

Most significant is the issue of the Court’s continuing jurisdiction over this case, which was also the core of the reason for the decision in *Planned Parenthood*. Justices Goodwin, Fletcher and Rymer held:

“Because the original action between Planned Parenthood and Neely had reached a

1 final resolution and the district court did not retain jurisdiction, we hold that it was an abuse of  
2 discretion to allow plaintiffs to supplement the complaint that formed the basis for that action,  
3 instead of requiring them to initiate a new suit. Accordingly, we reverse and remand with  
4 directions to dismiss the suit, and we vacate the injunction granted by the district court.” *Id.* at  
5 403

6 In the *Planned Parenthood* case, a final judgment had been rendered in the original  
7 action four years prior to plaintiffs’ request to supplement their complaint. That judgment had  
8 not been appealed and in no way would be affected by plaintiffs’ supplemental complaint. *Id.* at  
9 402

10 In the case at bar, no final judgment has been issued, and the case was only *filed* three  
11 years ago. Defendants contend that in the case at bar, “this Court retained jurisdiction for the  
12 limited purposes of receiving progress reports on the remand, ensuring timely agency actions,  
13 and making rulings on applications for attorneys’ fees.”

14 This Court has in no way limited its ongoing jurisdiction over this case. Why would this  
15 Court order NMFS to submit progress reports except for the Court to monitor compliance with  
16 its order and retain jurisdiction until its order was complied with? What would be the point of  
17 issuing an order and then monitoring the party who was the subject of the order if that party  
18 could merely change the title of its compliance vehicle and then disclaim the court’s  
19 jurisdiction?

20 **Amending the complaint will neither cause delay nor prejudice Defendants**

21 Under Rule 15, Federal Rules of Civil Procedure, leave to amend is liberally granted;  
22 upon the Court’s finding that such leave will not cause unreasonable delay or prejudice to  
23 Defendants. In the case at bar, amendment of the complaint will in fact obviate delay, by  
24 incorporating the revised and re-numbered regulation into the existing lawsuit. This would be  
25 more efficient than requiring all parties to start from the beginning with a new lawsuit, probably  
26 with a new judge, who must then become familiar with the myriad regulations and the factual  
27 background.

28 There are already seven cases on Pacific groundfish management assigned to three  
different judges, in this district alone.



1 Three are before this Court: C-01-0421 JL, *Natural Resources Defense Council v.*  
2 *Evans*; C-01-0637, *Natural Resources Defense Council v. Evans* (these two cases were  
3 consolidated); C-01-2506 JL, *Pacific Marine Conservation Council v. Evans*.

4 Two are before Hon. Charles R. Breyer: C-02-1650 CRB, *Natural Resources Defense*  
5 *Council v. Evans*; C-03-1444 CRB, *Natural Resources Defense Council v. Evans*.

6 One is before Hon. Phyllis J. Hamilton: C-03-4479 PJH, *Natural Resources Defense*  
7 *Council v. Evans*.

8 When Plaintiffs asked Judge Breyer to find that Defendants in one of his cases had  
9 violated an order by this Court, he advised them to seek relief from this Court. *Natural*  
10 *Resources Defense Council v National Marine Fisheries Service*, 280 F.Supp.2d 1007,  
11 1018 (N.D.Cal. 2003) ("Plaintiffs' argument in this case amounts to a claim that NMFS has  
12 failed to modify its practices in response to the judgment in *Evans* [200 F.Supp.2d 1194  
13 (N.D.Cal. 2002)]. That claim should be addressed to the court that decided *Evans* and will not  
14 be addressed here. See *NRDC v. Evans*, 243 F.Supp.2d 1046, 1059 (N.D.Cal. 2003)  
15 (directing parties to file periodic reports concerning 'defendants' progress toward  
16 implementing the court's previous orders.')"

17 Defendants fail to show any prejudice to them if Plaintiffs are permitted to amend their  
18 complaint.

19 The statutory deadline of 30 days following promulgation of the regulation for filing a  
20 petition for judicial review is strictly construed. It is a matter of first impression whether a  
21 petition for judicial review must necessarily take the form of an entirely new lawsuit, or whether  
22 it may be in the form of an amendment to the complaint in an existing lawsuit. In this instance,  
23 the existing lawsuit resulted in the remand of a regulation, which the purportedly new regulation  
24 is intended to replace. The remanding court should be the one to determine whether the  
25 proposed new regulation complies with the Court's findings regarding the deficiencies in the  
26 predecessor regulation. Judicial economy favors permitting judicial review via an amended  
27 complaint, rather than a new lawsuit.

28 **Peripheral issues do not justify denying leave to amend**

1 The presence or absence of one of the plaintiffs (Pacific Marine Conservation Council)  
2 is immaterial to whether the complaint may be amended. This Court's previous judicial  
3 mediation of another groundfish lawsuit in no way prejudices either of the parties. Plaintiffs  
4 speculate that Defendants are trying to avoid the jurisdiction of this Court. The Court declines  
5 to speculate on the parties' motives and focuses on the law.

6 **Conclusion:**

7 1. A party need not file a new lawsuit to obtain judicial review of a regulation proposed  
8 by an agency in response to the Court's remand under the provisions of the Magnuson-  
9 Stevens Act and the Administrative Procedures Act.

10 2. A party may amend its complaint in the action in which the court remanded the  
11 previous regulation to obtain judicial review of the proposed replacement regulation for the  
12 court to decide whether the proposed regulation complies with the court's order.

13 **Order**

14 Leave to amend the complaint is granted.

15 The Court may certify the matter for interlocutory review, tolling the time for filing a  
16 new petition for judicial review, should the Court of Appeal rule that a new lawsuit must be  
17 filed.

18 IT IS SO ORDERED.

19 DATED: March 29, 2004

20 /s/ James Larson

21 James Larson  
22 United States Magistrate Judge

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